(3)

No. 91-1231

In the Supreme Court of the United States

OCTOBER TERM, 1991

UNITED STATES OF AMERICA, PETITIONER

v.

ALVIN J. DIXON

UNITED STATES OF AMERICA, PETITIONER

v.

MICHAEL FOSTER

ON WRIT OF CERTIORARI TO THE DISTRICT OF COLUMBIA COURT OF APPEALS

BRIEF FOR THE UNITED STATES

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QUESTION PRESENTED

Whether the Double Jeopardy Clause bars prosecution of a defendant on substantive criminal charges that are based upon the same conduct for which the defendant previously has been held in contempt of court.

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OPINIONS BELOW

The opinion of the District of Columbia Court of Appeals (Pet. App. 1a-20a) is reported at 598 A.2d 724. The opinions of the Superior Court of the District of Columbia in *Foster* (Pet. App. 21a-24a) and *Dixon* (Pet. App. 25a-57a) are unpublished.

JURISDICTION

The judgment of the court of appeals was entered on October 31, 1991. The petition for a writ of certiorari was filed on January 29, 1992, and was

granted on April 27, 1992. The jurisdiction of this Court rests on 28 U.S.C. 1257.

CONSTITUTIONAL PROVISIONS, STATUTES, AND RULES INVOLVED

The Double Jeopardy Clause of the Fifth Amendment to the United States Constitution provides: "nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb." The pertinent District of Columbia statutes and rules are reprinted in an appendix to this brief.

STATEMENT

In each of these cases, the defendant violated a court order that prohibited him from engaging in certain conduct. In each case, the defendant was found to be in contempt of court for violating the order and was sentenced to a term of imprisonment. The defendant in each case was also indicted on substantive criminal charges arising from the same conduct for which he was held in contempt. The court of appeals dismissed the indictments, holding that criminal contempt proceedings, followed by prosecution for the same conduct, placed each defendant twice in jeopardy for the same offense, in violation of the Double Jeopardy Clause. Pet. App. 1a-20a.

1. *Foster.* On July 29, 1987, Foster's estranged wife, Ana, filed a petition in the Superior Court of the District of Columbia seeking a temporary protection order pursuant to D.C. Code Ann. § 16-1004(d) (1981). In support of her petition, she alleged that Foster had abused her repeatedly. Pet. App. 22a. On August 12, 1987, Foster consented to the entry of a one-year civil protection order (CPO) under D.C. Code Ann. § 16-1005(c) (1981). The court accordingly entered an order stating that Foster must not

"molest, assault, or in any manner threaten or physically abuse" his estranged wife. Pet. App. 4a; J.A. 18. The court also entered an order the same day forbidding Foster from engaging in any similar conduct toward his mother-in-law and ordering Foster to stay away from his mother-in-law's home and place of work. Pet. App. 4a.

Within a short time, Foster began violating the orders. On September 22 and November 19, 1987, and on May 24, 1988, Ana Foster filed motions seeking to have Foster held in contempt for 16 alleged violations of the CPO. Pet. App. 4a-5a; J.A. 19-20, 21-25, 26-29. Foster's mother-in-law also filed a motion seeking to have Foster held in contempt, alleging six violations of the CPO that prohibited Foster from threatening her. Pet. App. 5a. Ana Foster alleged that on September 17, 1987, Foster threatened to beat her, J.A. 19; on November 6, 1987, Foster "grabbed [her] and threw her against a parked car," J.A. 24; that on November 12, 1987, Foster called her at home and threatened to "blow out [her] brains," J.A. 24; that on March 26, 1988, Foster "called threatening [her]," J.A. 29; and that on May 17 he "called * * * threatening to kill [her]," J.A. 28. The most serious allegation was that on May 21 he "threw [her] down basement stairs, kicking her body," and "pushed her head into the floor causing head injuries," which resulted in her losing consciousness. *Ibid.*

The court heard evidence concerning the contempt charges at a three-day bench trial held on August 8-10, 1988. During the trial, eight witnesses testified. Ana Foster's counsel prosecuted the contempt. The United States did not participate in the trial. Pet. App. 5a & n.8. Foster was found guilty of four counts of criminal contempt, based on the November

6, 1987, and May 21, 1988, assaults on his wife, the September 17, 1987, threat against his wife, and the November 4, 1987, violation of the stay-away order relating to his mother-in-law. He was found not guilty of the remaining contempt charges, including those based on the alleged threats of November 12, 1987, March 26, 1988, and May 17, 1988. Pet. App. 6a-7a & n.10. He was sentenced to consecutive 150-day prison terms on each of the four counts on which he was convicted. See Pet. App. 2a.

Meanwhile, on July 21, 1988 (approximately two weeks before the contempt trial), the United States Attorney's office filed a complaint charging Foster with a single count of assault with intent to kill while armed, based on Foster's May 21, 1988, assault on his wife. On January 19, 1989, five months after the contempt trial, the grand jury returned a five-count indictment against Foster. Pet. App. 7a; J.A. 43-44. Count 1 charged Foster with simple assault on November 6, 1987, in violation of D.C. Code Ann. § 22-504 (1981). Count 5 charged him with assault with intent to kill on May 21, 1988, in violation of D.C. Code Ann. § 22-501 (1981). Counts 2, 3, and 4 charged him with threatening to injure Ana Foster on November 12, 1987, March 26, 1988, and May 17, 1988, in violation of D.C. Code Ann. § 22-2307 (1981). Counts 1 and 5 were based on the incidents for which Foster had been found guilty of criminal contempt; Counts 2, 3, and 4 were based on incidents for which Foster had been found not guilty of contempt after the criminal contempt trial. Pet. App. 7a-8a, 22a.

Foster moved to dismiss the indictment on double jeopardy and collateral estoppel grounds. The trial court denied the motion, holding that criminal contempt does not constitute the same offense as a sub-

stantive criminal charge based on the same conduct. Pet. App. 23a. In addition, the trial court relied on D.C. Code Ann. § 16-1002(c), which provides that "[t]he institution of criminal charges by the United States Attorney shall be in addition to, and shall not affect the rights of the complainant to seek any other relief under [the chapter regarding civil protection orders]." According to the court, that provision demonstrates "an intent by the legislature to allow two different remedies for a violation of Civil Protection Orders." The court explained that the contempt prosecution is "to protect the [party who obtained the order] and the ability of the Court to enforce its orders," and the substantive criminal prosecution is "to protect the community." Pet. App. 24a. The court did not rule on Foster's collateral estoppel arguments.

2. *Dixon.* On March 9, 1987, Dixon was arrested on a charge of second-degree murder while armed. Pet. App. 9a. The District of Columbia bail law provides that when an individual is released on bail, the judicial officer may impose any condition on the individual that "will reasonably assure the appearance of the person for trial or the safety of any other person or the community." D.C. Code Ann. § 23-1321(a) (1981). The judicial officer is directed to "issue an appropriate order containing a statement of the conditions imposed, if any, [and] shall inform such person of the penalties applicable to violations of the conditions of his release." D.C. Code Ann. § 23-1321(d) (1981). The bail law further provides that a person who has been released on bail and who has violated a condition of his release "shall be subject to revocation of release, an order of detention, and prosecution for contempt of court." D.C. Code Ann. § 23-1329(a) (1981).

Dixon was released on a $1500 surety bond. The printed release form stated that:

> You are hereby released on the conditions indicated below: These conditions will be in effect until your case is disposed of or until they are changed or amended by a judge. * * * You are to refrain from committing any criminal offense, the penalties for which are explained on the reverse side of this Order.

J.A. 8. On the reverse side, the order stated that "[y]ou are not to commit any criminal offense," and that "[a]ny violation of these conditions shall subject you to revocation of release, an order of detention, and prosecution for contempt of court." Pet. App. 9a, 26a.

In January 1988, while Dixon was awaiting trial on the murder charge, he was arrested and charged with possession of cocaine with intent to distribute it, in violation of D.C. Code Ann. § 33-541(a)(1) (1981). The government then filed a motion to modify the terms of Dixon's release on the murder charge, and the Superior Court judge ordered Dixon to "show cause why he should not be held in contempt of court or have the conditions of his pretrial release modified." J.A. 13. A two-day hearing was held on the show cause order. An Assistant United States Attorney examined witnesses concerning the cocaine charges, and the witnesses were cross-examined by Dixon's counsel. At the end of the hearing, the court concluded "that the government has established, beyond a reasonable doubt, that [Dixon] was in possession of drugs and that those drugs were possessed with the intent to distribute them." J.A. 15. Accordingly, the court found Dixon guilty of criminal contempt under D.C. Code Ann. § 23-1329(c) (1981) and sentenced him to 180 days in jail. J.A. 16.

Dixon thereafter moved to dismiss the cocaine indictment on double jeopardy grounds. The trial court granted the motion, Pet. App. 57a, rejecting the government's arguments that contempt of court and possession of cocaine with intent to distribute it are different offenses for purposes of the Double Jeopardy Clause. Pet. App. 31a, 33a-35a. The court recognized that "its decision may pose some difficult questions regarding the interaction of judges and prosecutors in initiating criminal proceedings," because a judge's decision to go forward with criminal contempt proceedings "would preclude the defendant from being tried for the underlying offense." Pet. App. 56a-57a.

3. Foster took an interlocutory appeal from the trial court's denial of his motion to dismiss his indictment, and the government appealed from the dismissal of the indictment in Dixon's case. After each case was separately briefed and argued, the District of Columbia Court of Appeals consolidated the two cases, reheard them *en banc*, and ruled that both prosecutions were barred by the Double Jeopardy Clause. Pet. App. 1a-20a.

The court of appeals concluded that this Court's decision in *Grady* v. *Corbin*, 495 U.S. 508 (1990), "control[led]" these cases and "greatly simplified the issues." Pet. App. 13a-14a. The court explained that because the conduct on which the contempt proceedings were based was the same conduct for which the government subsequently sought to prosecute the defendants, the Double Jeopardy Clause, as interpreted in *Grady* v. *Corbin*, barred the government from proceeding with the criminal charges. Pet. App. 15a-16a. The court observed that criminal contempt "is a crime in the ordinary sense," Pet. App. 18a (quoting *Bloom* v. *Illinois*, 391 U.S. 194, 201 (1968)), and that "the impact of a contempt prosecution on any defendant

• • • would be the same regardless of whether the contempt adjudication is sought by the government or a private party." Pet. App. 19a.

SUMMARY OF ARGUMENT

A. Prior to *Grady* v. *Corbin*, this Court and the overwhelming majority of lower courts had held that successive prosecutions for contempt and for a substantive offense based on the same conduct were permissible. Those decisions rested on three grounds, all of which remain sound today.

First, the offense of criminal contempt has entirely different elements from substantive offenses such as the crimes with which respondents were charged in this case. In accordance with the "elements" test that has traditionally been used to determine whether two offenses should be considered the "same offence" within the meaning of the Double Jeopardy Clause, contempt and the substantive offenses are properly held to be legally distinct, even when the two offenses are based on the same conduct.

Second, the interest protected by a prosecution for contempt is solely the interest of the court in vindicating its authority; the interest protected by a prosecution for substantive offenses, such as those at issue here, is the general social interest in protecting individuals and maintaining order in the community. For that reason as well, contempt should not be regarded as the same offense as a substantive charge that is based on the same conduct.

Third, the judiciary has the authority to prosecute a defendant for contempt without the participation—and indeed even over the objection—of the Executive Branch. If criminal contempt were considered the same offense as a substantive offense based on the same conduct, the courts could effectively preempt—

at the expense of core separation of powers principles—the authority to prosecute violations of the criminal law.

B. This Court's decision in *Grady* v. *Corbin* does not require departure from the established principle that criminal contempt is a different offense from a substantive crime that is based on the same conduct. *Grady* involved a single traffic accident that led to successive prosecutions, the first for traffic violations and the second for negligent assault and involuntary manslaughter. Although the traffic violations were not technically lesser included offenses of assault and manslaughter, they bore an analogous relationship, and the Court concluded that the double jeopardy principles applicable to lesser included offenses should be applied to the offenses at issue in *Grady* as well.

The offenses at issue in the present case arise in an entirely different context. The legal definitions of the offenses make clear that criminal contempt is not an aggravated form of the substantive offenses with which respondents were charged; the substantive offenses are thus not in any sense lesser included offenses of the crime of contempt. Accordingly, the holding of *Grady* does not extend to this case.

Although the language that the *Grady* Court used to describe the applicable double jeopardy test is broad enough to cover this case, we submit that the Court should not apply that language to bar the substantive charges at issue here. This Court has already determined in *United States* v. *Felix*, 112 S. Ct. 1377 (1992), not to read the language of *Grady* "expansively." An expansive reading of that language in this case would be improvident for the same reasons: it would upset well-established principles of double jeopardy law in a manner that the Court in *Grady* could not likely have intended.

C. If the Court determines that *Grady* compels the result reached by the court of appeals, then *Grady* should be reconsidered. The formulation that the Court devised in *Grady* to determine when successive prosecutions violate the Double Jeopardy Clause is not well founded in the language or history of the Double Jeopardy Clause; it is inconsistent with the precedents of this Court; and it is complex and difficult to apply. Because the formulation in *Grady* does not accurately capture the meaning of the term "same offence" in the Double Jeopardy Clause, the Court should not follow that formulation. If, however, the Court believes that adherence to *Grady* would compel affirmance in this case, it should reconsider and overrule *Grady*.

ARGUMENT

CONTEMPT OF COURT AND A SUBSTANTIVE CRIMINAL OFFENSE BASED ON THE SAME CONDUCT ARE NOT THE "SAME OFFENCE" FOR PURPOSES OF THE DOUBLE JEOPARDY CLAUSE

A. This Court's Cases Establish That The Double Jeopary Clause Does Not Preclude Successive Prosecution Of A Defendant For Contempt Of Court And A Substantive Offense Based On The Same Conduct

1. Almost a century ago, this Court expressed the view that a conviction for criminal contempt does not bar a subsequent prosecution for a substantive criminal offense. In *In re Debs*, 158 U.S. 564 (1895), the defendant was held in criminal contempt for violating an injunction. In the course of upholding the judicial power to punish contempt summarily, the Court stated that if a criminal prosecution should be brought against the defendants for the same conduct, "it will be no defence to such prosecution that they have disobeyed the orders of injunction served

upon them and have been punished for such disobedience." 158 U.S. at 594; see also *id.* at 599-600 ("the penalty for a violation of injunction is no substitute for and no defence to a prosecution for any criminal offences committed in the course of such violation"); *Bessette* v. *W.B. Conkey Co.*, 194 U.S. 324, 330 (1904) (quoting above language).[1]

Two years after the *Debs* decision, the Court reiterated the same principle in a case involving Congress's contempt power. In *In re Chapman*, 166 U.S. 661 (1897), the defendant was indicted for refusing to answer questions put to him by a congressional committee. The defendant argued that, since Congress itself had the power to punish the same conduct as contempt, the statute impermissibly subjected witnesses to being twice put in jeopardy for the same offense. The Court rejected that argument, observing that "indictable statutory offences may be punished as such, while the offenders may likewise be subjected to punishment for the same acts as contempts, the two being *diverso intuitu* and capable of standing together." 166 U.S. at 672. Accord *Jurney* v. *MacCracken*, 294 U.S. 125, 151 (1935).[2]

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[1] In *Bloom* v. *Illinois*, 391 U.S. 194 (1968), the Court rejected the holding in *Debs* that courts have inherent power to punish serious contempts summarily. *Bloom* did not, however, overrule *Debs* entirely. See *Young* v. *United States ex rel. Vuitton et Fils S.A.*, 481, 787, 796 n.8 (1987). Moreover, the Court in *Bloom* had no occasion to reconsider the statement in *Debs* that the same conduct could give rise to successive prosecutions for criminal contempt and a substantive criminal offense.

[2] In 1834, the Attorney General published an opinion to the same effect in connection with an incident involving an assault by General Sam Houston on a Member of the House of Representatives. General Houston was first punished for contempt

Prior to this Court's decision in *Grady* v. *Corbin*, the great majority of state and federal courts agreed that double jeopardy principles do not prohibit successive prosecutions for criminal contempt and substantive criminal offenses based on the same conduct. Although the issue did not arise frequently in the federal system, every court of appeals that addressed the issue adopted the majority view.[3] Similarly, every

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of Congress and was then convicted of the crime of assault. The Attorney General expressed the view that the contempt and the substantive criminal violation were not the "same offence" for double jeopardy purposes, and that the contempt proceedings therefore posed no bar to the subsequent indictment and conviction. The power of contempt, the Attorney General explained, is possessed by courts and other bodies "for the purpose of protecting themselves in the due exercise of their appropriate functions, and not for the purpose of vindicating the general law of the land, which may also have been violated by the same act." 2 Op. Att'y Gen. 655-656 (1834).

[3] Several of the cases involved disobedience of court orders directly analogous to those in this case. See *Orban* v. *United States*, 18 F.2d 374 (6th Cir. 1927); *Hansen* v. *United States*, 1 F.2d 316 (7th Cir. 1924); see also *Lewinsohn* v. *United States*, 278 F. 421, 428 (7th Cir. 1921), cert. denied, 258 U.S. 630 (1922). Other cases involved conduct otherwise found contemptuous. See *O'Malley* v. *United States*, 128 F.2d 676, 684 (8th Cir. 1942) (misrepresentation to court), rev'd on other grounds *sub nom. Pendergast* v. *United States*, 317 U.S. 412 (1943); *United States* v. *Rollerson*, 449 F.2d 1000 (D.C. Cir. 1971) (assaulting prosecutor; summary contempt); *Merchants' Stock & Grain Co.* v. *Board of Trade*, 201 F. 20, 27 (8th Cir. 1912). See also *United States* v. *Ferrugia*, 604 F. Supp. 668, 672-673 (E.D.N.Y. 1985) (summary contempt); *United States* v. *Mirra*, 220 F. Supp. 361 (S.D.N.Y. 1963) (assault on prosecutor during trial; summary contempt); *Chicago Directory Co.* v. *United States Directory Co.*, 123 F. 194 (C.C.S.D.N.Y. 1903) (submission of false documents to court). Contra *United States* v. *Haggerty*, 528 F. Supp.

state supreme court to consider the issue prior to *Grady* held that the Double Jeopardy Clause does not bar separate prosecutions for contempt of court and substantive criminal violations based on the same act.[4]

1286, 1295 (D. Colo. 1981) (contempt proceeding for violating injunction against striking against government and prosecution under statute prohibiting such strikes); *United States* v. *United States Gypsum Co.*, 404 F. Supp. 619 (D.D.C. 1975) (contempt proceeding for violating injunction against price-fixing and prosecution for substantive antitrust violation).

[4] A number of those cases arose from facts virtually identical to those presented in *Foster*. See, *e.g.*, *State* v. *Newell*, 532 So. 2d 1114 (Fla. Dist. Ct. App. 1988); *People* v. *Totten*, 514 N.E.2d 959 (Ill. 1987); *Commonwealth* v. *Allen*, 486 A.2d 363 (Pa. 1984), cert. denied, 474 U.S. 842 (1985); *State* v. *Sammons*, 656 S.W.2d 862 (Tenn. Crim. App. 1982). Other cases addressed a variety of fact patterns in which a single act constituted both criminal contempt of court, committed either by violation of a court order or by other contemptuous conduct, and a substantive criminal violation. See *Middlebrook* v. *State*, 43 Conn. 257, 267 (1876); *State* v. *Chapman*, 739 P.2d 310 (Idaho 1987) (violation of court order by kidnapping daughter); *Long* v. *Commonwealth*, 197 S.W. 843 (Ky. 1917) (summary contempt for assaulting witness outside court and criminal assault); *Commonwealth* v. *Gallarelli*, 362 N.E.2d 923 (Mass. 1977) (conspiracy to bribe juror); *Church* v. *State*, 111 So. 2d 228 (Miss. 1950) (violation of injunction by committing liquor law violations); *State* v. *Yancy*, 4 N.C. (Car. L. Rep.) 133 (1813) (summary contempt for assault in court); *Maples* v. *State*, 565 S.W.2d 202 (Tenn. 1978) (summary contempt for instituting fraudulent proceeding and giving false testimony); *Barrowman* v. *State ex rel. Evans*, 381 S.W.2d 251 (Tenn. 1964) (violation of injunction by committing liquor law violations); *Nicholas* v. *Commonwealth*, 45 S.E.2d 305 (Va. 1947) (violation of injunction by committing liquor law violations); see also *Ex parte Morris*, 227 P. 914, 915-917 (Cal. 1924); *Ex parte Allison*, 90 S.W. 870 (Tex. 1906) (violation of injunction by committing gambling law violations); *Fisher* v. *McDaniel*, 64 P. 1056 (Wyo. 1901)

That view reflects the common law practice as well. See F. Wharton, *Criminal Pleading and Practice* § 444, at 309 (9th ed. 1889); *Rex* v. *Lord Ossulston*, 93 Eng. Rep. 1063 (K.B. 1738).[5]

2. Sound reasons underlay the overwhelming pre-*Grady* consensus that the offense of criminal contempt is not the same as a substantive offense based on the same conduct. Those reasons are fully applicable to this case.

a. Many of the pre-*Grady* decisions relied on the fact that the elements of criminal contempt are entirely different from the elements of the substantive criminal offenses at issue in those cases and that contempt and the substantive offenses in question were thus not "the same offense" under the traditional "elements" test that this Court described in *Blockburger* v. *United States*, 284 U.S. 299, 304 (1932). See, *e.g.*, *United States* v. *Ferrugia*, 604 F. Supp. at 672-673; *People* v. *Totten*, 514 N.E.2d at 965; *Commonwealth* v. *Gallarelli*, 362 N.E.2d at 926; *Commonwealth* v. *Allen*, 486 A.2d at 368-370. Apply-

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(bribing a witness). Contra *State* v. *Hope*, 449 So. 2d 633 (La. Ct. App. 1984). Compare *State* v. *Thompson*, 659 P.2d 383, 387 (Ore. 1983) (decision based on nonconstitutional, state statutory grounds).

[5] Neither *Colombo* v. *New York*, 405 U.S. 9 (1972) (per curiam), nor *Menna* v. *New York*, 423 U.S. 61 (1975) (per curiam), is to the contrary. In *Colombo*, the defendant was first found guilty of criminal contempt for refusing to testify before a grand jury and then indicted under another criminal contempt provision of the state criminal code. This Court remanded for a determination whether the indictment was for the same refusal to testify. *Menna* apparently involved a similar fact pattern, and the case was similarly remanded to the New York Court of Appeals for "a determination of petitioner's double jeopardy claim on the merits," on which this Court "express[ed] no view." 423 U.S. at 63.

ing that test to this case, the result is clear. The elements of criminal contempt are (1) a court order made known to the defendant, followed by (2) willful violation of that order. See *In re Gorfkle*, 444 A.2d 934, 939 (D.C. 1982). Neither element of contempt of court would necessarily be satisfied by proof that a defendant had committed the substantive offenses with which respondents are charged (simple assault, threats, and assault with intent to kill, in Foster's case; possession of cocaine with intent to distribute it, in Dixon's case). Similarly, no element of any of the substantive offenses at issue here would necessarily be satisfied by proof that a defendant was guilty of contempt of court.

Respondents argued below that the *Blockburger* test should be applied not to the statutory elements of the offenses charged, but rather to the facts that must be proved under a particular indictment. See Foster C.A. Br. 9-16; Dixon C.A. Br. 9-17. That interpretation of *Blockburger* is mistaken. The formulation the Court employed in *Blockburger* itself turns on the facts that the statute requires to be proved, not those that become relevant in a given case: two offenses are different if "each *provision* requires proof of a fact which the other does not." 284 U.S. at 304 (emphasis added). See also *Grady* v. *Corbin*, 495 U.S. at 516, 520; *id.* at 528 (Scalia, J., dissenting); *United States* v. *Woodward*, 469 U.S. 105, 108 (1985) (per curiam); *Albernaz* v. *United States*, 450 U.S. 333, 337-338 (1981); *Iannelli* v. *United States*, 420 U.S. 770, 785 n.17 (1975); *Gore* v. *United States*, 357 U.S. 386 (1958).

b. Other pre-*Grady* decisions emphasized that the interest underlying criminal contempt—the vindication of the court's authority to enforce its orders—

is entirely distinct from the interests promoted by substantive criminal statutes that contain general prohibitions against particular classes of antisocial conduct. See, *e.g.*, *Ex parte Morris*, 227 P. at 916; *Long* v. *Commonwealth*, 197 S.W. at 843-844; *State* v. *Sammons*, 656 S.W.2d at 868. The purpose of criminal contempt is to enable the court to enforce its orders. *Young* v. *United States ex rel. Vuitton et Fils S.A.*, 481 U.S. 787, 804 (1987); see also *United States* v. *Providence Journal Co.*, 485 U.S. 693, 701-702 (1988). As this Court has stated, the power to punish for contempt is "inherent in all courts," because "its existence is essential to the preservation of order in judicial proceedings, and to the enforcement of * * * judgments * * * and consequently to the due administration of justice." *Ex parte Robinson*, 86 U.S. (19 Wall.) 505, 510 (1874). See also *United States* v. *Hudson*, 11 U.S. (7 Cranch) 32, 34 (1812) ("[t]o fine for contempt—imprison for contumacy—inforce the observance of order * * * are powers which cannot be dispensed with in a Court, because they are necessary to the exercise of all others"); *Michaelson* v. *United States*, 266 U.S. 42, 65 (1924); *Gompers* v. *Bucks Stove & Range Co.*, 221 U.S. 418, 450 (1911).

The fact that courts retain power to punish criminal contempts "should not obscure the fact that [contempt] proceedings are not intended to punish conduct prescribed as harmful by the general criminal laws," but are rather "to serve the limited purpose of vindicating the authority of the court." *Young*, 481 U.S. at 800.[6] Thus, the interest protected by the crim-

[6] An early decision by the North Carolina Supreme Court made this point succinctly, as applied to an assault that was the subject of both a summary contempt proceeding and an indictment: "Although but one injury is done to the individual assaulted, yet the same act constitutes two public offenses; which, according to the circumstances, might require different degrees of punishment. * * * One offense violates the law which protects courts of justice, and stamps an efficient character on their proceedings; the other is levelled against the general law, which maintains the public order and tranquillity." *State* v. *Yancy*, 4 N.C. (Car. L. Rep.) at 133-134.

inal contempt sanction is far different from the interests protected by substantive criminal statutes such as the ones under which Foster and Dixon were prosecuted. The interests promoted by those statutes are those of the community as a whole through the protection of its members from physical violence (in Foster's case) or the evils of drugs (in Dixon's case).

This Court has repeatedly recognized that the interests protected by particular criminal statutes is an important factor to be taken into account in determining whether those statutes define the same or different offenses. For example, in *Albernaz* v. *United States*, 450 U.S. 333, 343 (1981), the Court noted that its conclusion that the two drug conspiracy statutes at issue in that case defined distinct offenses "[was] reinforced by the fact that the two conspiracy statutes are directed to separate evils." See also *United States* v. *Woodward*, 469 U.S. 105, 109 (1985) (per curiam) (statutes designed to protect against separate evils authorize cumulative punishment); *Ball* v. *United States*, 470 U.S. 856, 864 (1985) (statutes not directed to separate evils do not authorize cumulative punishments). Because the interest protected by a criminal contempt prosecution differs so dramatically from the interests protected by prosecution for a general substantive offense, the court of appeals' holding that the two are the "same offense" is incongruous.

c. Finally, in addition to the different interests protected by the criminal contempt power and substantive criminal statutes, the court's control over criminal contempt prosecutions has been cited as a reason for permitting separate prosecution of substantive criminal offenses. *Commonwealth* v. *Allen*, 486 A.2d at 367. It is typically the court that "makes the initial decision that a contempt prosecution should proceed." *Young*, 481 U.S. at 807. Moreover, the court typically retains substantial control over the prosecution of contempts, for even if the court initially refers the matter to the Executive Branch for prosecution, the court may "exercise its inherent power of self-protection" to appoint its own prosecutor if the Executive Branch declines to pursue the case. *Young*, 481 U.S. at 801.

The facts of this case underscore the significance of the court's independent role in contempt proceedings. In *Foster*, no representative of the Executive Branch participated in the contempt prosecution. See Pet. App. 5a & n.8. In *Dixon*, the United States Attorney moved to modify the conditions of the defendant's pretrial release after the defendant had been apprehended on the drug charge. It was the trial court, however, that took the initiative in ordering the defendant to "show cause why he should not be held in contempt" and ultimately decided after the hearing to punish the defendant for contempt of court. Pet. App. 10a. Thus, the court (and, in *Foster*, the private complainant) initiated the contempt proceedings and retained the authority to continue or to terminate the contempt prosecutions.

In light of the court's role in prosecuting criminal contempt cases, to hold that a criminal contempt proceeding bars a subsequent prosecution for a substantive offense would give a court substantial power

over the prosecution of non-contempt cases, in tension with separation of powers principles. A primary constitutional responsibility of the Executive Branch is to "take Care that the Laws be faithfully executed." U.S. Const. Art. II, § 3. That responsibility has long been understood to encompass the responsibility for initiating and prosecuting criminal cases. *Heckler* v. *Chaney*, 470 U.S. 821, 832 (1985); *Buckley* v. *Valeo*, 424 U.S. 1, 138 (1976); *United States* v. *Nixon*, 418 U.S. 683, 693 (1974). "[S]o long as the prosecutor has probable cause to believe that the accused committed an offense defined by statute, the decision whether or not to prosecute, and what charge to file or bring before a grand jury, generally rests entirely in his discretion." *Bordenkircher* v. *Hayes*, 434 U.S. 357, 364 (1978); see *United States* v. *Batchelder*, 442 U.S. 114, 124 (1979) (citing cases). This Court has accordingly ruled that a court may not exercise control over the basic decisions concerning whether to prosecute a given defendant and what charges to press against that defendant, see, *e.g.*, *United States* v. *Thompson*, 251 U.S. 407, 414-415 (1920), unless those decisions are made in violation of some provision of law. Even where such a violation is suspected, the judicial inquiry must be narrowly tailored to protect the Executive Branch's prosecutorial function. *Wayte* v. *United States*, 470 U.S. 598, 607-608 (1985); *United States* v. *Goodwin*, 457 U.S. 368, 380 n.11 (1982); *Marshall* v. *Jerrico, Inc.*, 446 U.S. 238, 248 (1980).

Under the court of appeals' decision, however, a court by initiating a criminal contempt prosecution could preclude the Executive Branch from exercising its power to prosecute violations of the criminal law.[7]

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[7] Similarly, it would appear that, under the court of appeals' decision, the Executive Branch by initiating a prosecution of

In *Foster*, for example, the decisions of the private complainant and the court to initiate contempt proceedings against the defendant for violating the civil protection orders would preclude the United States from prosecuting him for a number of serious criminal offenses, including assault with intent to kill. Similarly, in *Dixon*, the decision of the court to hold the defendant in contempt for violating the conditions of the court's pretrial release order would preclude the United States from prosecuting him for a serious drug violation. The harm is particularly clear in this case, because the criminal contempt offenses applicable to Foster and Dixon were petty offenses, for each of which the defendants faced a maximum of only six months' imprisonment, while the substantive crimes with which they were charged were serious felonies for which they were exposed to lengthy prison terms.[8]

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a defendant on substantive offenses could preclude a court from proceeding against the defendant on contempt charges. That result, too, would threaten constitutional separation of powers principles.

[8] Under District of Columbia law, the maximum penalty for violating a civil protection order is six months' imprisonment and a $300 fine. D.C. Superior Court Rules Governing Intrafamily Proceedings 12(e). The maximum penalty for violating a pre-trial release order is six months' imprisonment or a $1,000 fine. D.C. Code Ann. § 23-1329(c) (1981). In the criminal proceedings, Foster was charged with simple assault, in violation of D.C. Code Ann. § 22-504 (1981) (maximum 1 year of imprisonment and $500 fine), three counts of threatening to injure a person, in violation of D.C. Code Ann. § 22-2307 (1981) (maximum 20 years' imprisonment and a $5,000 fine each), and one count of assault with intent to kill, in violation of D.C. Code Ann. § 22-501 (1981) (maximum 15 years' imprisonment, with a minimum of 2 years' imprisonment). Dixon was charged with possession of cocaine with intent to distribute it, in violation of D.C. Code Ann. § 33-541(a)(1) (1981) (maximum 15 years' imprisonment and a $100,000 fine).

This Court has repeatedly held that courts may exercise their power to prosecute criminal contempts only to the extent necessary to protect their authority. *United States* v. *Wilson*, 421 U.S. 309, 319 (1975); *Shillitani* v. *United States*, 384 U.S. 364, 371 n.9 (1966); *Anderson* v. *Dunn*, 19 U.S. (6 Wheat.) 204, 231 (1821). The court of appeals' holding would ironically convert that narrow mandate into the much broader power to control the Executive's exercise of prosecutorial discretion. By serving the "limited purpose" of vindicating its own authority, *Young*, 481 U.S. at 800, the court would disserve the ability of the community as a whole to vindicate its interest in the enforcement of core criminal prohibitions. The Double Jeopardy Clause ought not apply to bar prosecution "where the [government] has made no effort to prosecute the charges seriatim," *Ohio* v. *Johnson*, 467 U.S. 493, 500 n.9 (1984), and, indeed, where the government has no way of preventing such separate prosecution.

The division of prosecutorial authority between courts and prosecutors mirrors the division between the state and federal governments that underlies the "dual sovereignty" doctrine. Under that doctrine, state and federal authorities may separately prosecute a defendant for similar, or even identical, offenses. See, *e.g.*, *United States* v. *Wheeler*, 435 U.S. 313 (1978); *Heath* v. *Alabama*, 474 U.S. 82 (1985); *Abbate* v. *United States*, 359 U.S. 187, 190-194 (1959); *Moore* v. *Illinois*, 55 U.S. (14 How.) 13, 20 (1852); *Fox* v. *Ohio*, 46 U.S. (5 How.) 410, 435 (1847) ("offences falling within the competency of different authorities to restrain or punish them [are]

properly subjected to the consequences which those authorities might ordain and affix to their perpetration"); cf. *Bartkus* v. *Illinois*, 359 U.S. 121 (1959) (due process). The dual sovereignty doctrine is justified in part by concern that, without that doctrine, one sovereign's prosecution for a relatively minor offense could preclude the other from prosecuting a defendant for a grave violation of its law. See *Abbate*, 359 U.S. at 195; *Bartkus*, 359 U.S. at 137.[9] Such control by a State over the ability of other States and the federal government to enforce their own criminal laws would be intolerable in a federal system.

The same rationale is applicable here. To permit a court's exercise of its limited contempt powers to preclude a later prosecution on substantive criminal offenses "would bring about a marked change in the distribution of powers to administer criminal justice." *Abbate*, 359 U.S. at 195. The Double Jeopardy Clause does not bar separate prosecutions by separate sovereigns, because those prosecutions are brought by two distinct prosecuting authorities, neither of which may exercise power over the other. Cf. *In re Chapman*, 166 U.S. 661, 672 (1897). Because an analogous relationship obtains between judicial and executive prosecutorial authority where separate prosecutions are brought for criminal contempt and

[9] The Court noted in *United States* v. *Lanza*, 260 U.S. 377, 385 (1922):

> If a State were to punish the manufacture, transportation, and sale of intoxicating liquor by small or nominal fines, the race of offenders to the courts of that State to plead guilty and secure immunity from federal prosecution for such acts would not make for respect for the federal statute or for its deterrent effect.

substantive criminal offenses, the Double Jeopardy Clause is equally inapplicable to separate prosecutions in that setting.

d. Respondents are mistaken in contending (Br. in Opp. 10-11) that changes in the law of contempt have rendered obsolete the rule that criminal contempt may be prosecuted separately from substantive offenses based on the same conduct. Cf. Pet. App. 18a-19a. Although defendants charged with contempt of court are now entitled to most of the procedural protections that are afforded to defendants charged with substantive crimes,[10] the rule permitting separate prosecution for contempt and substantive offenses turns on the nature of the two offenses, not on the procedures that are employed in their prosecution.

Contempt has long been regarded as "a specific criminal offence." *New Orleans* v. *Steamship Co.*, 87 U.S. (20 Wall.) 387, 392 (1874); see also *Gompers* v. *United States*, 233 U.S. 604, 610 (1914); *O'Neal* v. *United States*, 190 U.S. 36, 38 (1903) (an adjudication of contempt is "in effect a judgment in a criminal case"). There is thus no force to the suggestion that at the time of this Court's decisions in *Debs* and *Bessette*, contempt was not regarded as a criminal offense and that the Court therefore did not have to consider whether successive procecutions for contempt and conventional crimes

[10] See, *e.g.*, *Bloom* v. *Illinois*, 391 U.S. 194, 201-202 (1968) (right to jury trial); *Offutt* v. *United States*, 348 U.S. 11 (1954) (right to public trial before unbiased judge); *Cooke* v. *United States*, 267 U.S. 517 (1925) (right to counsel, to call witnesses, to be advised of charges and to respond); *Gompers* v. *Bucks Stove & Range Co.*, 221 U.S. 418, 444 (1911) (presumption of innocence, proof beyond reasonable doubt, right not to testify).

would pose double jeopardy problems. Indeed, in *Bessette*, one of this Court's cases stating that a prosecution for contempt does not bar prosecution for a criminal offense committed in the course of the contempt, the Court noted that the proposition that criminal contempt proceedings "are criminal in their nature has been constantly affirmed." 194 U.S. at 336. Developments in the procedures required for contempt trials have therefore not had any effect on the basic proposition that contempt and substantive charges based on the same acts are not the same offense for double jeopardy purposes.

B. *Grady* v. *Corbin* Does Not Require Departure From The Settled Principle That Criminal Contempt And A Substantive Offense Based On The Same Conduct Are Not The Same Offense Under The Double Jeopardy Clause

The court of appeals believed that this Court's decision in *Grady* v. *Corbin* "control[s]" the outcome of this case. Pet. App. 14a. Although the language the Court used in *Grady* is broad enough to address this case, the holding of *Grady* is considerably narrower. As this Court has recently explained, *Grady* and its predecessor, *Illinois* v. *Vitale*, 447 U.S. 410 (1980), stand for the proposition that offenses that are "not technically lesser included offenses" may nonetheless be characterized as "a species of lesser-included offense," *United States* v. *Felix*, 112 S. Ct. 1377, 1384 (1992) (quoting *Vitale*, 447 U.S. at 420), and that successive prosecutions for such offenses are barred under the Double Jeopardy Clause. We submit that *Grady* should be confined to that setting and not applied to crimes such as the ones at issue in this case, which do not bear any resemblance to greater and lesser included offenses.

1. The defendant in *Grady* was driving while legally drunk. His car crossed the median line of a two-way highway and hit another car, killing one of the occupants and injuring the other. The defendant first pleaded guilty to the traffic violations of driving while intoxicated and crossing the median line in connection with an automobile accident. He was subsequently prosecuted on homicide and assault charges arising from the accident. See 495 U.S. at 511-513.

The traffic violations in *Grady* were not technically lesser included offenses of the homicide or assault charges, because the traffic violations required proof that the defendant was operating a motor vehicle, which was not an element of the homicide and assault offenses. Nonetheless, the Court held that the homicide and assault charges were barred to the extent that the government sought to establish elements of homicide and assault by re-proving the traffic violations. 495 U.S. at 522-523. The Court stated as the rule of the case that "the Double Jeopardy Clause bars any subsequent prosecution in which the government, to establish an essential element of an offense charged in that prosecution, will prove conduct that constitutes an offense for which the defendant has already been prosecuted." 495 U.S. at 521.[11]

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[11] That formulation addressed the case in which the lesser (or "component") offense is prosecuted first, followed by a separate prosecution for the greater offense. For the converse case in which the greater offense is prosecuted first and the lesser included (or component) offense second, the Court stated that "if in the course of securing a conviction for one offense the State necessarily has proved the conduct comprising all of the elements of another offense not yet prosecuted (a 'component offense'), the Double Jeopardy Clause would bar subsequent prosecution of the component offense." 495 U.S. at 521 n.11.

By its terms, that formulation is broad enough to cover this case. The court orders in this case directed Foster and Dixon, *inter alia*, to refrain from engaging in criminal conduct—Foster's order directed him not to "assault, or in any manner threaten or physically abuse" his wife, and Dixon's order directed him "to refrain from committing any criminal offense" while on pretrial release. See Pet. App. 4a, 10a. To prove an "essential element" of the contempt offense, the government in each case proved "conduct that constituted an offense" (assault and threats in Foster's case, and a drug violation in Dixon's) that was to be the subject of the substantive criminal prosecution.[12] To apply that formulation here, however, would disregard the rationale underlying both *Grady* and the precedents on which it relied.

In *Grady*, the State sought to "prove the entirety of the conduct for which Corbin [had already been] convicted—driving while intoxicated and failing to keep right of the median—to establish essential elements of the homicide and assault offenses." 495 U.S. at 523. The Court concluded that under the State's theory of the case, the traffic violations were in effect lesser included offenses of the homicide and assault charges. In the Court's view, it was as improper to permit reprosecution in that setting as it would have been if the legislature had specifically

[12] There is some possible ambiguity in the Court's reference to conduct that the State "necessarily has proved" in the course of securing a conviction of the greater offense. See 495 U.S. at 521 n.11. In light of the formulation used in the text of the opinion, however, it appears that the reference to conduct that the State "necessarily has proved" means that the State must have found it necessary to rely on the conduct constituting the "component" offense in order to prove an element of the greater offense.

provided that in order to prove homicide or assault, the State had to prove that the defendant had been driving while intoxicated or that he had failed to keep to the right of the median.

In its recent decision in *United States* v. *Felix*, 112 S. Ct. 1377 (1992), the Court read *Grady* in the manner we propose here. The Court noted that the formulation of the double jeopardy test set forth by the Court in *Grady*, if "[t]aken out of context, and read literally," would "support[] the defense of double jeopardy." *Id.* at 1383-1384. But the *Felix* Court "decline[d] to read that language so expansively, because of the context in which *Grady* arose and because of difficulties which have already arisen in its interpretation." *Id.* at 1384. Instead, the Court observed that *Grady* was based on decisions barring subsequent prosecution "if one of the two offenses is a lesser included offense of the other." *Ibid.* Although the traffic offenses in *Grady* were not technically lesser included offenses of the homicide and assault charges, the *Felix* Court characterized the decision in *Grady* as following an earlier suggestion that traffic violations of that sort might be viewed "as a 'species of lesser-included offense' " of a subsequent homicide charge. *Ibid.*, quoting *Illinois* v. *Vitale*, 447 U.S. at 420.

The same theme is present in the two cases on which the *Grady* Court principally relied, *Harris* v. *Oklahoma*, 433 U.S. 682 (1977) (per curiam), and *Illinois* v. *Vitale*, 447 U.S. 410 (1980). In *Harris*, the Court held that a defendant could not be prosecuted for robbery after having been convicted of felony murder based on the same robbery. The offenses at issue in *Harris* were not "the same" under a technical reading of the *Blockburger* "elements" test because, "as a statutory matter, felony murder could be established by proof of any felony, not just

robbery, and robbery with a firearm did not require proof of a death." *Grady*, 495 U.S. at 520. Nonetheless, the Court concluded that the underlying felony was a lesser included offense of the crime of felony murder, because the felony murder statute required the State to prove the commission of an underlying felony as an element of the murder charge. The fact that the State had a single felony murder statute that incorporated all qualifying felonies, rather than a separate felony murder statute for each qualifying felony, was not considered sufficient to change the result. The Court viewed the felony murder charge as simply an aggravated form of the underlying robbery, which is a classic description of a greater and lesser included offense. See also *Whalen* v. *United States*, 445 U.S. 684, 694 (1980) (double jeopardy analysis of felony murder is same as if legislature "had separately proscribed the six different species of felony murder under six statutory provisions").[18]

[18] Although the Court in *Grady* considered *Harris* to be inconsistent with the traditional elements test, we agree with Justice Scalia, dissenting in *Grady* (495 U.S. at 528), that *Harris* can be reconciled with traditional double jeopardy analysis. An aggravated form of a felony is still the "same offense" as the lesser included felony, even when the aggravated felony offense is drafted in a manner that incorporates more than one lesser included offense. Thus, for example, the federal armed bank robbery statute, 18 U.S.C. 2113(d) is an aggravated form of the lesser included offenses of bank robbery and bank larceny, 18 U.S.C. 2113(a) and (b); for double jeopardy purposes, it is the "same offence" as those lesser included offenses, even though it does not set out the elements of each of the lesser offenses, and even though it includes all of the lesser included offenses by generic reference. *Harris* stands for the unremarkable proposition that, for purposes of applying the "elements" test, the aggravated felony offense should be treated as if it specifically included the elements of the particular underlying offense at issue in the case.

In *Vitale*, the State first convicted the defendant of carelessly failing to reduce speed to avoid an accident, and then prosecuted him for involuntary manslaughter based on the two fatalities that resulted from the accident. The Court noted that if a careless failure to slow is not always a necessary element of manslaughter, the two offenses would not technically be the "same" under the elements test. Nonetheless, the Court stated that if the State sought to prove the manslaughter by showing that the defendant carelessly failed to reduce speed, the relationship between the two offenses would be analogous to that of a greater and lesser included offense, and the defendant's "claim of double jeopardy would be substantial." 447 U.S. at 420. As the Court in *Grady* explained its decision, the facts of that case raised the hypothetical situation discussed in *Vitale*, and the Court in *Grady* adopted the suggestion in *Vitale* as its holding. See *Grady*, 495 U.S. at 510, 515-516; see also *Felix*, 112 S. Ct. at 1384.

2. The crimes at issue in this case are not greater and lesser included offenses, and they bear no resemblance to such offenses. Assault with intent to kill and drug distribution are serious felonies that cannot easily be conceived of as lesser included offenses of the crime of contempt of court, which is a petty offense as applied to the conduct in this case. See note 8, *supra*. Although a violation of a court order—one of the elements of contempt of court—was established in part by proof that the defendants committed substantive criminal offenses, that did not render the offense of contempt an aggravated form of assault or drug possession.

A lesser included offense is one that is "necessarily included" in the offense charged, and the rules governing lesser included offenses provide that a defendant may be convicted of the lesser offense if the jury does not convict on the greater. See Fed. R. Crim. P. 31(c); *Schmuck* v. *United States*, 489 U.S. 705, 717-718 (1989). Plainly, the offenses in this case do not fit that model, for in Foster's contempt trial the court could not have convicted Foster of assault with intent to kill, and in Dixon's contempt trial the court could not have convicted Dixon of possession of drugs.[14] That is because neither assault with intent to kill nor drug distribution is, on any reasonable view, a "component offense" of contempt of court, see *Grady*, 495 U.S. at 521 n.11, or "an incident and part of" that offense, see *In re Nielsen*, 131 U.S. 176, 187 (1889).

The traffic violations in *Grady* and *Vitale*, although not technically lesser included offenses of the homicide and assault charges, could nonetheless be considered "components" or "incidents of" those charges much more readily than the substantive offenses in this case could be considered components of the offense of contempt. Even without reference to the particular facts of those cases, the Court viewed the traffic violations as sufficient to prove the "carelessness" element of the greater offenses with which the defendants were charged. See *Vitale*, 447 U.S. at

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[14] For that reason, Foster and Dixon were not in jeopardy during their contempt proceedings with respect to the substantive crimes with which they were later charged. Compare *Green* v. *United States*, 355 U.S. 184 (1957) (double jeopardy bars retrial on greater offense following conviction on lesser included offense that constitutes implied acquittal of greater offense).

420 ("Vitale has already been convicted for conduct that is a necessary element of the more serious crime"); *Grady*, 495 U.S. at 516 (quoting above language: "We believe that this analysis is correct and governs this case.").

Unlike in *Vitale* or *Grady*, the offenses at issue in this case are not even analogous to greater and lesser included offenses. The substantive crimes, as legally defined, establish nothing with respect to the offense of contempt; it is only by referring to the facts of the individual cases—and in particular the contents of the courts' orders—that any relationship between the substantive crimes and the contempt offense becomes evident. The analogy to greater and lesser included offenses that was controlling in *Vitale* and *Grady* is thus inapt in this case.

An example may illustrate what anomalous results the *Grady* test can produce when that test is applied to cases that fall outside the lesser included offense model on which *Grady* is based. Suppose the government sought to try a defendant separately for traveling in interstate commerce to conduct a narcotics business, in violation of the Travel Act, 18 U.S.C. 1952, and for murdering a federal drug agent in the course of that narcotics operation, in violation of 18 U.S.C. 1111. Suppose further that in the Travel Act prosecution the government used the murder to establish the "thereafter act" requirement of the Travel Act (the requirement that, after traveling, the defendant must perform some act in furtherance of the unlawful activity).

Under a broad reading of the *Grady* test, a subsequent prosecution for the murder would appear to be barred, since the government in the Travel Act case would have proved "conduct that constitute[d]"

the offense of murder "to establish an essential element" of the Travel Act. *Grady*, 495 U.S. at 510. That result, however, would be an extraordinary extension of double jeopardy principles, because murder is not in the remotest sense the "same offence" as a Travel Act violation, nor is it in any way a lesser included offense under the Travel Act. The same is true in this case. Just as the double jeopardy analysis of *Grady* would not be extended to the hypothetical case, it should not be applied here.

3. In *Felix*, this Court declined to read *Grady* expansively in a way that would have altered previously well-settled principles of double jeopardy law. The issue in *Felix* was whether *Grady* overturned the "established doctrine" that a conspiracy to commit an offense is not the same as the offense that is the object of the conspiracy. 112 S. Ct. at 1385. The Court concluded that *Grady* had not upset the "long-standing authority" of the rule permitting separate prosecutions for conspiracy and its object offense. 112 S. Ct. at 1385.

The same considerations counsel against an expansive interpretation of *Grady* in this case. The doctrine that contempt is a different offense from the substantive crimes that the contemnor may have committed has long been recognized by this Court and the lower federal and state courts. The traditional *Blockburger* "elements" test reinforces the conclusion that contempt and substantive crimes are not the same offense for double jeopardy purposes. Because the offenses at issue in this case, like those at issue in *Felix*, are not akin to lesser included offenses, the prosecutions in this case should not be barred by the exception to the elements test that the Court devised in *Grady*.

C. If This Court Concludes That *Grady* v. *Corbin* Must Be Read To Bar Successive Prosecution For Criminal Contempt And Substantive Offenses Based On The Same Conduct, This Court Should Reconsider The Reasoning And Result Of That Case

If the Court concludes that *Grady* must be read broadly, in a manner that would require affirmance in this case, we submit that *Grady* should be reconsidered and overruled.

We recognize that this Court does not lightly overrule one of its prior precedents, and we do not lightly suggest that it do so. *Stare decisis* is "the preferred course because it promotes the evenhanded, predictable, and consistent development of legal principles, fosters reliance on judicial decisions, and contributes to the actual and perceived integrity of the judicial process." *Payne* v. *Tennessee*, 111 S. Ct. 2597, 2609 (1991); see also *Hilton* v. *South Carolina Public Railways Comm'n*, 112 S. Ct. 560, 564 (1991); *Welch* v. *Texas Dep't of Highways and Public Transportation*, 483 U.S. 468, 494 (1987); *Vasquez* v. *Hillery*, 474 U.S. 254, 265-266 (1986). Nevertheless, *stare decisis* has never been understood to be an "inexorable command." *Burnet* v. *Coronado Oil & Gas Co.*, 285 U.S. 393, 405 (1932) (Brandeis, J., dissenting). "[W]hen governing decisions are unworkable or are badly reasoned, 'this Court has never felt constrained to follow precedent.'" *Payne* v. *Tennessee*, 111 S. Ct. 2597, 2609 (1991), quoting *Smith* v. *Allwright*, 321 U.S. 649, 665 (1944). Thus, *stare decisis* is "a principle of policy and not a mechanical formula of adherence to the latest decision." *Helvering* v. *Hallock*, 309 U.S. 106, 119 (1940).

Although this Court has never adopted a "rigid formula" for determining when to overrule a prior decision (*Vasquez*, 474 U.S. at 266), it has identified several factors that bear on that inquiry. It

is well settled that *stare decisis* has less force when constitutional issues, rather than matters of statutory construction, are involved, because "correction through legislative action is practically impossible" in constitutional cases, *Burnet*, 285 U.S. at 407. For that reason, the Court's "considered practice [has been] not to apply *stare decisis* as rigidly in constitutional [cases] as in nonconstitutional cases." *Glidden Co.* v. *Zdanok*, 370 U.S. 530, 543 (1962).[15] In addition, *stare decisis* has less weight when the prior ruling was itself a departure from past precedents [16] and when experience demonstrates that the earlier rule has proved unworkable, has bred confusion, or has led to unforeseen or anomalous results.[17]

The case for overruling *Grady* finds strong parallels in this Court's decisions in *Solorio* v. *United*

[15] See also, *e.g.*, *Thomas* v. *Washington Gas Light Co.*, 448 U.S. 261, 272-273 (1980) (plurality opinion); *Monell* v. *Department of Social Services*, 436 U.S. 658, 695 (1978); *Edelman* v. *Jordan*, 415 U.S. 651, 671 (1974). That is particularly true in a case such as this one, which does not involve a constitutional doctrine on which parties have relied in ordering their affairs. Compare *Allied-Signal, Inc.* v. *Director, Division of Taxation*, No. 91-615 (June 15, 1992), slip op. 12; *Quill Corp.* v. *North Dakota*, No. 91-194 (May 26, 1992), slip op. 17; *id.* at 2 (Scalia, J., concurring in part and concurring in the judgment).

[16] *E.g.*, *Collins* v. *Youngblood*, 110 S. Ct. 2715, 2722 (1990); *Thomas* v. *Washington Gas Light Co.*, 448 U.S. at 273 (plurality opinion); *Monell* v. *Department of Social Services*, 436 U.S. at 695-696; *Continental T.V., Inc.* v. *GTE Sylvania Inc.*, 433 U.S. 36, 47 (1977); *United States* v. *Darby*, 312 U.S. 100, 116-117 (1941).

[17] *E.g.*, *Payne* v. *Tennessee*, 111 S. Ct. at 2611; *California* v. *Acevedo*, 111 S. Ct. 1982, 1991 (1991); *Collins* v. *Youngblood*, 110 S. Ct. at 2722; *Continental T.V., Inc.* v. *GTE Sylvania Inc.*, 433 U.S. at 47.

States, 483 U.S. 435 (1987), and *Payne* v. *Tennessee*, 111 S. Ct. 2597 (1991). In *Solorio*, the Court overruled its 1969 decision in *O'Callahan* v. *Parker*, 395 U.S. 258, which dealt with the constitutional limits on the jurisdiction of military courts. The Court noted that *O'Callahan* had overturned a long and unbroken line of precedent, was inconsistent with the history of the applicable constitutional provision, and had spawned confusion in the military judicial system. The Court therefore concluded that *O'Callahan* should be reconsidered.

The Court reached the same conclusion in *Payne*, for many of the same reasons. As the Court explained, the prior decisions in *Booth* v. *Maryland*, 482 U.S. 496 (1987), and *South Carolina* v. *Gathers*, 490 U.S. 805 (1989), "were decided by the narrowest of margins, over spirited dissents challenging the basic underpinnings of those decisions." 111 S. Ct. at 2611. Moreover, the Court concluded that the decisions in *Booth* and *Gathers* had "defied consistent application by the lower courts." *Ibid.* Being firmly of the view that those cases were wrongly decided, the Court in *Payne* concluded that they should be overruled.

The same analysis applies here. *Grady*, like the overruled precedents in *Solorio* and *Payne*, was decided by the narrowest of margins, over strong dissents challenging its basic rationale. *Grady* has also engendered confusion in the lower courts, and *Grady* was itself a departure from a long and unbroken string of precedent. Most importantly, the decision in *Grady* is simply wrong: it is inconsistent with the language of the Double Jeopardy Clause and the history of that Clause going back to its origins in the common law. Under these circumstances, the case for overruling *Grady* is a compelling one.

1. The language of the Double Jeopardy Clause strongly supports the use of a test that looks to the elements of the offenses at issue, rather than the particular acts that are the subject of the charges, as the basis for determining whether successive prosecutions are permissible. As Justice Scalia noted in his dissent in *Grady*, 495 U.S. at 529, the Clause "protects individuals from being twice put in jeopardy 'for the same *offence*,' not for the same *conduct* or *actions*."

This Court in *Gavieres* v. *United States*, 220 U.S. 338 (1911), drew precisely the distinction that Justice Scalia drew between an "offense," as that term is used in the Double Jeopardy Clause, and the "acts" or "conduct" that may constitute one or more such "offenses." Although the Court in *Grady* did not cite *Gavieres*, the *Grady* "conduct" test for successive prosecutions is flatly inconsistent with the elements test as the Court explained and applied that test in *Gavieres*.

Gavieres was first convicted of behaving in an indecent manner in a public place, and he was subsequently convicted of insulting or threatening public officials.[18] The Court held that, notwithstanding the fact that "the acts and words of the accused set forth in both charges are the same," there was no double jeopardy bar to the second prosecution. 220 U.S. at 342. As the Court observed, "while the transaction charged is the same in each case, the offenses are different." *Ibid.* See also *Burton* v. *United States*, 202 U.S. 344, 380 (1906) (no double jeopardy bar "if the offenses charged in the two indictments be perfectly distinct in point of law, *however nearly they may be connected in fact*"). Of particular note, in light of the Court's adoption of a "same conduct" test in *Grady*, the *Gavieres* Court expressly rejected such a test, stating that "[w]hile it is true that the conduct of the accused was one and the same, two offenses resulted, each of which had an element not embraced in the other." 220 U.S. at 345. We submit that the Court in *Gavieres* was faithful to the language of the Double Jeopardy Clause, and that the Court in *Grady* disregarded that language and thereby fell into error.

2. The historical case against *Grady* is made in Justice Scalia's dissenting opinion in that case. Citing decisions from England and this country both before and after the adoption of the Fifth Amendment, Justice Scalia demonstrated that the elements test has traditionally been the device used to determine whether two offenses are legally distinct and therefore can support successive prosecutions. The majority in *Grady* did not dispute Justice Scalia's historical analysis, except to claim that the elements test has not been the governing test for successive prosecutions since the Court's 1889 decision in *In re Nielsen*, 131 U.S. 176 (1889).

The majority in *Grady* was incorrect in suggesting that the Court has not applied the elements test to successive prosecution claims since *Nielsen*. In fact, the Court has routinely applied the elements test in its successive prosecution cases, including *Nielsen* itself. See *Payne* v. *Virginia*, 468 U.S. 1062 (1984) (per curiam); *Harris* v. *Oklahoma*, 433 U.S.

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[18] *Gavieres* was a Philippines prosecution that arose while the Philippines were under United States jurisdiction. While the case was not governed directly by the Double Jeopardy Clause, it was governed by an Act of Congress that had been construed to provide an equivalent protection in Philippines prosecutions. See 220 U.S. at 341; *Kepner* v. *United States*, 195 U.S. 100 (1904). Accordingly, the Court's analysis in *Gavieres* is based on constitutional double jeopardy principles.

682 (1977) (per curiam); *Brown* v. *Ohio*, 432 U.S. 161, 166-167 (1977); *United States* v. *Bayer*, 331 U.S. 532, 542-543 (1947); *Gavieres* v. *United States*, 220 U.S. 338, 342-344 (1911); *Grafton* v. *United States*, 206 U.S. 333, 349-351 (1907); *Burton* v. *United States*, 202 U.S. 344, 380-381 (1906). Only in *Grady* has the Court held that two statutes that are distinct under the elements test will nonetheless not support successive prosecutions.[19]

Contrary to the statement in *Grady*, the Court's decision in *Nielsen* is consistent with the use of the elements test to determine whether successive prosecutions are permitted for a violation of different statutes. The defendant in *Nielsen* was first charged with cohabitation, based on the allegation that he had lived as man and wife with two women continuously for several years. After the defendant pleaded guilty to the cohabitation charge, the government sought to prosecute him for committing adultery with one of the two women. 131 U.S. at 177. The Court held the second prosecution barred by the Double Jeopardy Clause.

The Court in *Nielsen* treated the question before it as whether the offense of adultery was entirely encompassed within the offense of cohabitation, as defined in an 1882 federal statute directed at prohibiting polygamy. As the governing test, the Court adopted the formulation set forth in *Morey* v. *Commonwealth*, 108 Mass. 433, 435 (1871), which is exactly the same formulation that the Court later

[19] In *Garrett* v. *United States*, 471 U.S. 773, 789 (1985), the Court suggested that for compound offenses involving "multilayered conduct, both as to time and to place," successive prosecutions might be permitted even if the two statutes in question did not have distinctive elements.

adopted in *Blockburger*: "A single act may be an offence against two statutes; and if each statute requires proof of an additional fact which the other does not, an acquittal or conviction under either statute does not exempt the defendant from prosecution and punishment under the other." *Nielsen*, 131 U.S. at 188, quoting *Morey*, 108 Mass. at 434. The Court then analyzed the crimes of adultery and cohabitation and concluded that the offense of adultery was a lesser included offense of the offense of cohabitation as defined in the 1882 statute. Although the Court's analysis in reaching that conclusion is somewhat obscure and may be questionable as a matter of statutory construction, the Court's constitutional analysis was clear: the Court held that the elements test was the proper means to determine whether two statutory crimes constituted the same offense and therefore could not be the subject of successive prosecutions.[20]

The *Nielsen* case demonstrates that the Court did not abandon the elements test in 1889, as the Court suggested in *Grady*. To the contrary, *Nielsen* makes clear that the Court regarded the elements test, as

[20] To reach the conclusion, under the elements test, that adultery was a lesser included offense of cohabitation, the Court had to find that two of the elements of adultery, (1) that the parties committed intercourse, and (2) that one of them was married to someone else, were necessary elements of cohabitation. The Court did so by noting that the 1882 cohabitation statute was aimed at polygamy and therefore required that the cohabiting parties "live together as husband and wives." 131 U.S. at 189. In the Court's view, that phrase necessarily implied intercourse, *id.* at 187, and it also required the government to prove that the cohabiting parties lived in a state of marriage, *id.* at 189. The Court therefore concluded that each element of adultery was also an element of the crime of cohabitation.

developed by the common law courts, to be the proper test for determining whether two crimes constitute the same offense for double jeopardy purposes. The Court reviewed the early American cases and the contemporaneous commentators, all of which agreed that the test for determining what constitutes the "same offense" for purposes of the lawfulness of successive prosecutions turns on the elements of the offenses charged, not the identity of the conduct that is the subject of the two prosecutions. 131 U.S. at 187-190. As the *Nielsen* Court put it, "[t]he test is not, whether the defendant has already been tried for the same act, but whether he has been put in jeopardy for the same offence." 131 U.S. at 188.

3. Finally, the complex formulation in *Grady*, which focuses on the particular conduct that is the subject of prosecution, has proved to be unworkable. The standard set forth in that case, which bars any subsequent prosecution in which the government, "to establish an essential element of an offense charged in that prosecution, will prove conduct that constitutes an offense for which the defendant has already been prosecuted," 495 U.S. at 521, is a linguistic minefield. It introduced a number of terms—such as "to establish an essential element" and "conduct that constitutes an offense"—that have never before been used in double jeopardy analysis and that have no well-defined legal meaning. Moreover, the formulation is ambiguous on some critical points. For example, it is unclear whether the proof of conduct "to establish" an element of a second offense means that the proof must actually establish the element in question, or only be offered in an effort to establish that element. Likewise, it is unclear whether the reference to "conduct that constitutes" the first offense

means that the government must find it necessary to prove all the elements of the first offense in the second prosecution.

The Court in *Felix* acknowledged that the *Grady* test has given rise to "difficulties * * * in its interpretation," 112 S. Ct. at 1384, and that "the line between the [same evidence and same transaction] tests and the 'same conduct' language of *Grady* is not easy to discern". As a result, lower federal and state courts have found *Grady* difficult to apply.[21] Indeed, in *Felix* itself, which represented the first occasion that this Court has had to apply *Grady*, the test articulated in *Grady* came into apparent conflict with a well-settled doctrine of double jeopardy law—the principle that a conspiracy and its objects are separate offenses—and the Court declined to apply the *Grady* formulation. The instant case signals that clashes between the *Grady* formulation and otherwise settled double jeopardy principles is likely to continue as long as the *Grady* standard is left undisturbed.

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[21] See, *e.g.*, *Ladner* v. *Smith*, 941 F.2d 356, 364 (5th Cir. 1991) (*Grady*'s "lesson, even if carefully analyzed and painstakingly administered, is not easy to apply"), cert. denied, 112 S. Ct. 1665 (1992); *United States* v. *Calderone*, 917 F.2d 717 (2d Cir. 1990), vacated, 112 S. Ct. 1657 (1992) (three court of appeals judges interpret *Grady* in three different ways); *State* v. *Kipi*, 811 P.2d 815, 821 (Haw.), cert. denied, 112 S. Ct. 194 (1991) (concluding that *Grady* in effect requires prosecutors to join all related offenses in a single prosecution); *State* v. *Woodfork*, 478 N.W.2d 248 (Neb. 1991), overruling *State* v. *Harrington*, 461 N.W.2d 752 (Neb. 1990) (state court reaches contrary conclusions about the effect of *Grady* in two post-*Grady* decisions); *Eatherton* v. *State*, 810 P.2d 93 (Wyo. 1991) (majority concludes that *Grady* does not change double jeopardy law; dissent concludes that *Grady* dramatically changes double jeopardy law).

4. If *Grady* is overruled, what should take its place? We submit that in most settings the *Blockburger* elements test is the appropriate guide to what constitutes the same offense. As Justice Scalia's analysis in *Grady* makes clear, that was the test used to determine when common law offenses were "the same," and it has long been the test used by both state and federal courts to make the same determination for statutory offenses. Thus, at least for ordinary criminal offenses, the elements test not only reflects a commonsense notion of when two statutory offenses are distinct, but it also accurately captures the original sense of the term "same offence" as used in the Double Jeopardy Clause.

That is not to say, however, that strict adherence to the *Blockburger* elements test is invariably appropriate. As we have noted, the elements test, if applied with undue strictness, can sometimes be underinclusive in identifying prosecutions that are for "the same offense" within the meaning of the Double Jeopardy Clause, as was the case in *Harris* v. *Oklahoma*, *supra*. By the same token, the *Blockburger* test can sometimes be overinclusive. While the elements test is appropriate for most cases involving a single course of conduct, it does not necessarily suffice for cases involving crimes that require proof of the commission of multiple predicate offenses over a period of time. For example, the prosecution must prove all the elements of a drug offense when it seeks to use that offense as one of the series of violations necessary to prove a continuing criminal enterprise (CCE) charge. Nonetheless, this Court has expressed "serious doubts" whether a drug offense that serves as a predicate offense for a continuing criminal enterprise (CCE) charge is a " 'lesser included offense' within the CCE charge so that the prosecution of the former

would bar a prosecution of the latter." *Garrett* v. *United States*, 471 U.S. 773, 790 (1985). See also *United States* v. *Felix*, 112 S. Ct. at 1385 ("Reliance on the lesser included offense analysis * * * falls short in examining CCE offenses that are based on previously prosecuted predicate acts."); *United States* v. *Evans*, 951 F.2d 729 (6th Cir. 1991), cert. denied, 112 S. Ct. 1966 (1992).

The same principle applies to offenses that serve as predicate acts of racketeering in a RICO prosecution, see 18 U.S.C. 1962(c). The predicate acts are not considered lesser included offenses (even though they may technically fail to satisfy the *Blockburger* test), and successive prosecutions for RICO and its predicate offenses are therefore permitted. See, *e.g.*, *United States* v. *O'Connor*, 953 F.2d 338 (7th Cir.), cert. denied, 112 S. Ct. 1979 (1992); *United States* v. *Arnoldt*, 947 F.2d 1120, 1125-1127 (4th Cir. 1991), cert. denied, 112 S. Ct. 1666 (1992); *United States* v. *Gonzalez*, 921 F.2d 1530, 1535-1539 (11th Cir.), cert. denied, 112 S. Ct. 178 (1991); *United States* v. *Gambino*, 920 F.2d 1108, 1112-1113 (2d Cir. 1990), cert. denied, 112 S. Ct. 54 (1991); *United States* v. *Pungitore*, 910 F.2d 1084, 1107 (3d Cir. 1990), cert. denied, 111 S. Ct. 2009 (1991); *United States* v. *Brooklier*, 637 F.2d 620, 621-624 (9th Cir. 1980), cert. denied, 450 U.S. 980 (1981).[22]

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[22] A hypothetical "career offender" statute provides another example of a statute that would not satisfy the *Blockburger* test but would clearly support successive prosecutions. Most recidivist statutes impose additional penalties on persons who are shown to have several prior convictions. It is well settled that prosecution under those statutes does not violate the Double Jeopardy Clause. See *Spencer* v. *Texas*, 385 U.S. 554, 559-560 (1967); *Gryger* v. *Burke*, 334 U.S. 728, 732 (1948). While recidivist statutes typically require the State only to prove that the defendant has committed a new offense after

Because complex offenses such as CCE and RICO were unknown at common law, it is not surprising that the traditional elements test, which has its origins in the common law of crimes, does not necessarily resolve the question whether those offenses are separate from their individual predicate crimes for double jeopardy purposes. As the Court has noted in *Garrett* and *Felix*, the " 'lesser included offense' principles of double jeopardy" cannot readily be transposed "from the classically simple situation" presented in cases such as *Brown* v. *Ohio* to compound offenses such as CCE and RICO. *Felix*, 112 S. Ct. at 1385; *Garrett*, 471 U.S. at 789.

Where the offenses in question are novel statutory offenses having no common law analogues, the courts must look to the intent of the legislature to determine whether the new offenses were intended to be distinct offenses—and thus separately prosecutable—or merely enhanced forms of pre-existing crimes. The legislative will is regarded as dispositive in closely analogous settings, such as determining whether two statutes permit cumulative punishment,[23] and determin-

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previously having been convicted of other offenses, we submit that such a statute would not be impermissible under the Double Jeopardy Clause if, in order to ensure the reliability of the prior convictions, the statute required the State to re-prove the prior offenses beyond a reasonable doubt. Even though the State would be required to re-prove all the elements of the prior offenses in the prosecution under the recidivist statute, the prior offenses would not be "lesser included offenses" of the recidivist statute in any conventional sense, and the recidivist violation would therefore not be the "same offence" as the prior offenses.

[23] See, *e.g.*, *Ohio* v. *Johnson*, 467 U.S. 493 (1984); *Missouri* v. *Hunter*, 459 U.S. 359 (1983); *Albernaz* v. *United States*, 450 U.S. 333 (1981).

ing "[w]hether a particular course of conduct involves one or more distinct 'offenses' " under a single statute, *Sanabria* v. *United States*, 437 U.S. 54, 70 (1978).[24] Thus, where the legislature has attempted to create distinct offenses and is acting outside the context of traditional offenses analogous to those found at common law, it is appropriate to look to legislative purpose to determine whether two separate statutes create different offenses and would therefore support successive prosecutions under the Double Jeopardy Clause.[25] Subject to that qualification, however, we believe that the elements test is the appropriate starting point—and normally the appropriate ending point as well—for determining whether successive prosecutions under different statutory provisions are permissible. In this case, the elements test establishes that the substantive offenses with which both Dixon and Foster have been charged are different from the crime of contempt for which they were previously prosecuted. The Double Jeopardy Clause

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[24] See, *e.g.*, *Ladner* v. *United States*, 358 U.S. 169, 173 (1958) (Congress may define whether wounding two federal officers with a single shotgun blast constitutes one or two violations of a statute prohibiting assaulting a federal officer); *Bell* v. *United States*, 349 U.S. 81, 82-83 (1955) (Congress may define whether transporting a number of women across a state line for purposes of prostitution constitutes one or several Mann Act violations); *United States* v. *Universal C.I.T. Credit Corp.*, 344 U.S. 218, 221 (1952) (Congress may define whether a single act resulting in payment of subminimum wage to many employees constitutes one or many violations of the Fair Labor Standards Act).

[25] In the case of both RICO and CCE, it is clear that Congress intended to create a new offense altogether, not simply an aggravated form of one or more of the predicate crimes. See *Garrett* v. *United States*, 471 U.S. at 784-785; *Russello* v. *United States*, 464 U.S. 16, 26-28 (1983).

therefore does not bar their prosecution for the assault and drug crimes with which they have been charged.

CONCLUSION

The judgments of the District of Columbia Court of Appeals should be reversed.

Respectfully submitted.

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APPENDIX

1. D.C. Code Ann. § 16-1002(c) (1981) provides, in pertinent part:

> The institution of criminal charges by the United States attorney shall be in addition to, and shall not affect the rights of the complainant to seek any other relief under this chapter.

2. D.C. Code Ann. § 16-1004(a) (1981) provides, in pertinent part:

> Upon a filing of a petition for civil protection by the Corporation Counsel or by a complainant, the Family Division shall set the matter for hearing, consolidating it, where appropriate, with other matters before the Family Division involving members of the same family.

3. D.C. Code Ann. § 16-1005(c) (1981) provides, in pertinent part:

> If, after hearing, the Family Division finds that there is good cause to believe the respondent has committed or is threatening an intrafamily offense, it may issue a protection order—
>
> (1) directing the respondent to refrain from the conduct committed or threatened and to keep the peace toward the family member;
>
> * * * * *
>
> (3) directing, where appropriate, that the respondent avoid the presence of the family member endangered;
>
> * * * * *
>
> (f) Violation of any temporary or permanent order issued under this chapter and failure to

appear as provided in subsection (a) shall be punishable as contempt.

4. D.C. Code Ann. § 22-501 (1981) provides:

> Every person convicted of any assault with intent to kill * * * shall be sentenced to imprisonment for not less than 2 years or more than 15 years.

5. D.C. Code Ann. § 22-504 (1981) provides:

> Whoever unlawfully assaults, or threatens another in a menacing manner, shall be fined not more than $500 or be imprisoned not more than 12 months, or both.

6. D.C. Code Ann. § 22-2307 (1981) provides:

> Whoever threatens within the District of Columbia to * * * injure the person of another * * * shall be fined not more than $5,000 or imprisoned not more than 20 years, or both.

7. D.C. Code Ann. § 23-1329 (1981) provides, in pertinent part:

> (a) A person who has been conditionally released pursuant to section 23-1321 and who has violated a condition of release shall be subject to revocation of release, an order of detention, and prosecution for contempt of court.
>
> * * * * *
>
> (c) Contempt sanctions may be imposed if, upon a hearing and in accordance with principles applicable to proceedings for criminal contempt, it is established that such person has intentionally violated a condition of his release. Such contempt proceedings shall be expedited and heard by the court without a jury. Any person found guilty of criminal contempt for violation of a condition of release shall be imprisoned for not more than six months, or fined not more than $1,000, or both.

8. D.C. Code Ann. § 33-541 provides, in pertinent part:

> (a)(1) Except as authorized by this chapter, it is unlawful for any person knowingly or intentionally to manufacture, distribute, or possess, with intent to manufacture or distribute, a controlled substance.
>
> (2) Any person who violates this subsection with respect to:
>
> > (A) A controlled substance classified in Schedule I or II which is a narcotic drug, phencyclidine, or a phencyclidine immediate precursor, is guilty of a crime and upon conviction may be imprisoned for not more than 15 years, or fined not more than $100,000, or both.

9. D.C. Superior Court Rules Governing Intrafamily Proceedings provide, in pertinent part:

> Rule 7. Motions.
>
> (c) *Motion for contempt for violation of protection order.* When a motion for contempt is filed alleging violation of a civil protection order or temporary protection order, the Intrafamily Clerk shall issue a notice of hearing and order directing appearance. * * * Punishment upon a finding of contempt shall be limited as provided in [Superior Court Rules] Intrafamily 12(e).
>
> Rule 12. Contempt.
>
> (b) *Violation of protection order.* A motion alleging one or more violations of a temporary

protection order or civil protection order shall be filed and served pursuant to Rule 7(c).

* * * * *

(e) *Punishment upon finding of contempt by the Division.* Contempt may be punished by a fine or penalty of not more than $300.00 or by imprisonment for not more that six (6) months, or both.

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